Supreme Court, U.S.
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No. 06-623

In The Supreme Court of the United States

ARTHUR J. MISISCHIA, D.M.D.,

Petitioner,

v.

ST. JOHN'S MERCY HEALTH SYSTEM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF ST. JOHN'S MERCY HEALTH SYSTEM, ST. JOHN'S MERCY MEDICAL CENTER FOUNDATION, AND ST. JOHN'S MERCY HEALTH CARE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENTS

Dr. Misischia's Petition for Writ of Certiorari correctly lists the parties to the proceedings.

Pursuant to Supreme Court Rule 29.6, Respondent St. John's Mercy Health System, formerly known as St. John's Mercy Medical Center ("St. John's"), hereby states that it is a Missouri 501(c)(3) not-for-profit corporation and as such, has no parent corporation nor is there any publicly held corporation that holds ten percent or more of its stock.

Pursuant to Supreme Court Rule 29.6, Respondent St. John's Mercy Medical Center Foundation hereby states that it is a Missouri 501(c)(3) not-for-profit corporation and as such, has no parent corporation nor is there any publicly held corporation that holds ten percent or more of its stock.

Pursuant to Supreme Court Rule 29.6, Respondent St. John's Mercy Health Care, formerly known as Unity Health System, hereby states that it is a Missouri 501(c)(3) not-for-profit corporation and as such, has no parent corporation nor is there any publicly held corporation that holds ten percent or more if its stock.

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STATEMENT OF THE CASE

This case arises out of a decision by St. John's in 1993 to summarily suspend Dr. Misischia's medical/dental staff privileges pending resolution of an allegation that Dr. Misischia punched a patient. Two committees of hospital physicians investigated the charges and recommended that Dr. Misischia's suspension be upheld until such time as Dr. Misischia was evaluated by an independent professional who could certify that Dr. Misischia was fit to return to work. Dr. Misischia elected to appeal the committees' recommendation. St. John's Board of Trustees upheld the recommendation of its physicians and ordered that Dr. Misischia's suspension be continued until he received independent psychiatric clearance that he was not a threat to patients. In accordance with the Health Care Quality Improvement Act, 42 U.S.C. §§1101 *et seq.*, St. John's filed a so-called "Data Bank Report" describing its action in summarily suspending Dr. Misischia.

In the spring of 1994, Dr. Misischia visited with a psychiatrist that was acceptable to him and was evaluated. The evaluation concluded that Dr. Misischia was fit to again see patients. Accordingly St. John's lifted Dr. Misischia's suspension and duly reported that fact to the Data Bank. The report stated: "[t]his report revises the adverse action report filed 2/17/94, which informed the [Data Bank] of the summary suspension of Dr. [Misischia] pending psychiatric evaluation. Based on the receipt of a positive evaluation, the summary suspension of Dr. [Misischia] has been revoked, effective April 25, 1994." (App. at 16a-17a). At this time, St. John's also elected to terminate Dr. Misischia's relationship with the hospital effective April 1994.

In October 1994, Dr. Misischia commenced his first lawsuit against St. John's and others, including Dr. Delfino, claiming that his summary suspension was part of a conspiracy to retaliate against him for whistle-blowing on a host of alleged improprieties at the hospital including poor quality of care, lack of quality review, inflated and false billing practices, ghost surgery, and falsifying medical records. After six years of litigation, including a full trial on the merits, judgment was entered for St. John's against Dr. Misischia on all of his claims against St. John's. The appellate decision affirming the judgment is reported at *Misischia v. St. John's Mercy Medical Center*, 30 S.W. 3d 848 (Mo. App. 2000) ("*Misischia I*").

Having lost in *Misischia I*, Dr. Misischia then appealed St. John's April 25, 1994 Data Bank Report to the Secretary of Health and Human Services requesting that any reference to his psychiatric examination be deleted. The Secretary rejected Dr. Misischia's request but directed St. John's to remove the word "positive" from the text of the report because "positive" in medical parlance could give the impression that a problem was found with Dr. Misischia notwithstanding the additional language that his suspension was lifted. St. John's duly amended the report.

Still not satisfied, Dr. Misischia sued the Secretary in 2002 to bar any use of the Data Bank Report so long as there was a reference to his psychiatric exam. The court dismissed the case on statute of limitations grounds finding that Dr. Misischia was fully aware of the April 1994 Data Bank Report when it was filed and that his two years to challenge the report expired in 1996. (App. at 18a).

Then, nearly ten years to the day after filing *Misischia I*, Dr. Misischia again sued St. John's and others

under the Racketeer Influenced and Corrupt Organization Action ("RICO"), 18 U.S.C. §1961 *et seq.*, statute making the claim that the Hospital was engaged in a conspiracy to retaliate against persons, such as Dr. Misischia, for whistle-blowing on essentially the same list of improprieties that Dr. Misischia alleged in *Misischia I*.

Although Dr. Misischia disingenuously refers to *Misischia I* as "an unrelated employment action" (Pet. at 3), the record is to the contrary. The District Court found that:

> The claims in *Misischia I* and the present action all arose from the same series of transactions or acts. Plaintiff challenged the quality of the training in the residency program and the necessity and quality of surgery performed by Dr. Delfino. He was reported to the peer review process based on reports that he mishandled patients and was summarily suspended. A report was made to the [Data Bank] and was subsequently revised; the revision was misleading and created the erroneous impression that Plaintiff suffered from a psychiatric impairment. The Court notes that, despite knowing the contents of the disputed revision when he filed *Misischia I*, plaintiff chose not to challenge the report in that lawsuit.

(App. at 23a). Likewise the Eighth Circuit concluded that Dr. Misischia's 2004 RICO action made essentially the same claims made in *Misischia I*:

> Here, Misischia's amended RICO complaint alleged ten predicate acts that occurred in the year before he filed the state court action in October 1994. Those acts may or may not have been sufficient to state and prove a RICO violation. But

> they caused the bulk of Misischia's alleged injuries – wrongful suspension, a psychiatric evaluation, termination, and the filing of a false [Data Bank] report – and the alleged predicate acts occurring thereafter added little if anything to his RICO claims. Thus, whether or not sound, the RICO claim could have been raised in October 1994.

(App. at 7a). Based on the above findings, first the District Court and then the Eighth Circuit dismissed Misischia's second lawsuit on grounds of res judicata under Missouri state law. Although the District Court also found that Dr. Misischia's RICO claim was time-barred under the applicable statute of limitations, the Eighth Circuit expressly declined to address the statute of limitations argument and dismissed Dr. Misischia's action solely on res judicata grounds.

REASONS FOR DENYING THE PETITION

Dr. Misischia's petition should be denied because he is seeking review of a question that was not addressed by the court below. The Eighth Circuit affirmed the dismissal of Dr. Misischia's lawsuit on state law grounds of res judicata. Yet Dr. Misischia, who does not contest the res judicata ruling, asks this Court to review an issue that the Eighth Circuit expressly declined to rule upon; i.e., the statute of limitations for a RICO claim, and in particular, whether a new claim accrues upon the occurrence of each new predicate act. It is self-evidently inappropriate to seek this Court's review of a question that was not decided by the court below and that is not outcome determinative of this case. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74

(1955); *United Public Workers of America (CIO) v. Mitchell*, 330 U.S. 75, 89 (1947). For these reasons, Dr. Misischia's petition should be denied.

Recognizing the lack of merit in seeking review of a non-dispositive issue that was not addressed by the court below, Dr. Misischia seeks to tether his hypothetical RICO question to res judicata making the unsupported declaration that "[a]lthough the decision was couched in terms of *res judicata* law, it necessarily required an analysis of when a RICO cause of action accrues." (Pet. at 22). The only apparent support for why res judicata is tethered to RICO's accrual rule for statute of limitations is Dr. Misischia's view that a claim based on alleged predicate acts occurring in 2001 through 2003 after he lost *Misischia I*, could not be barred by the res judicata effect of the final judgment in 2000. (Pet. at 22-23). Thus, Dr. Misischia asserts that "he should not be barred from seeking redress for the predicate acts committed and the injuries he suffered between August 2000 and August 2004." (Pet. at 27).

Dr. Misischia, however, never made a claim for acts and injuries solely occurring between August 2000 and August 2004. Dr. Misischia's amended complaint alleged a RICO cause of action based on acts and injuries commencing in 1993 and continuing through 2004. Dr. Misischia's claim in this case was never for the post 2000 acts alone. Rather, Dr. Misischia's pleadings and stated position before the Eighth Circuit was that he could litigate all of his grievances beginning in 1993 and continuing until today because the predicate acts occurring in the four years preceding the filing of the present case, and occurring after the 2000 judgment in *Misischia I*, could revive his

ability to seek recovery for acts and injuries arising from 1993. As the Eighth Circuit explained:

> The question is not whether the alleged predicate acts occurring after the state court judgment would support an independent RICO claim. The question is whether adding these [post 2000] predicate acts to acts occurring in 1993 and 1994 can revive RICO claims that are otherwise barred.

(App. at 7a). Thus, the issue as advanced by Dr. Misischia in his pleadings and briefs to the courts below, is different from that contained in his petition to this Court. Seeking review by this Court of a point not advanced in the proceedings below is clearly inappropriate.

In addition to Dr. Misischia changing theories to seek review of a non-issue, the insinuation that Dr. Misischia was inappropriately barred from amending his 1993-2004 RICO time frame is also a non-issue. The Eighth Circuit found that such a "contention is without merit" explaining:

> Misischia raised this issue with a one line request in his brief opposing defendants' motion to dismiss. 'in the alternative, should the Court disagree with Plaintiff, Plaintiff respectfully requests leave to amend his Complaint.' He made no motion for leave to amend and did not explain the substance of his proposed amendment.

(App. at 8a). Dr. Misischia had a full opportunity to attempt to articulate a claim based solely upon events occurring after the 2000 judgment in *Misischia I*, but failed to do so. Thus, the claim that Dr. Misischia could have made to test his RICO statute of limitations argument is simply not a

part of this case as he failed to assert it in the lower courts.[1]

CONCLUSION

Dr. Misischia's petition to this Court should be denied for three reasons. First, Dr. Misischia seeks review of an issue that the Eighth Circuit expressly chose not to decide. Second, review would not alter the result in this case as the dismissal of Dr. Misischia's complaint was based upon the application of Missouri state res judicata law and not the RICO statute of limitations. Third, the RICO theory that Dr. Misischia seeks to advance in this Court is not the RICO theory he presented to the courts below, having waived his opportunity to amend his complaint to present the claims he now wishes this Court to revive. Review before this Court is never appropriate for hypothetical questions on theories of recovery that were not advanced before or considered by the court below and that would not

[1] Dr. Misischia's decision to never advance a claim solely on post 2000 events reflects the utter lack of merit to such claims satisfying the elements for a RICO lawsuit. As the Eighth Circuit explained "the alleged predicate acts occurring thereafter [the state court judgment] added little if anything to his RICO claims." (App. at 7a). There is no doubt that the post 2000 predicate acts all depended upon the issuance of the allegedly false Data Bank Report. That Data Bank Report was issued in April, 1994, and as the Eighth Circuit found, any "RICO claims could have been raised in October 1994" when Dr. Misischia first filed his state court claims. (App. at 7a).

have made any difference in the outcome of the case. The petition should be denied.

Respectfully submitted,

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